IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

CRL.A.No. 1067 of 2004(A)

SC.675/1999 OF THE ADDL. SESSIONS COURT, (ADHOC-II), KASARAGODE),

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APPELLANT/ PETITIONER/ ACCUSED:

K.M.HAMZA @ HAMSAPPA,
CONVICT NO.910, CENTRAL PRISON, KANNUR.

BY ADV. ADV.SOUMYAVATHY.(STATE BRIEF).

RESPONDENT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI. NOBLE MATHEW.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

Crl.A.No.1067 OF 2004

Dated 25th September, 2007

JUDGMENT

Koshy,J.

Appellant was charge sheeted for offence punishable under Sections 302 and 397 of the Indian Penal Code on the allegation that with the intention of committing murder and robbery he has taken Khadeeja, the deceased, on 15.11.98 to Kattikulam forest at Thrissileri amsom in Wayanad District and committed murder and removed her gold ornaments weighing three and a half sovereigns and hanged her body in a teak tree. The trial court convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life with a fine of Rs.10,000/=. He was acquitted of the offence under Section 397 IPC. The appellant was unable to engage an advocate of his own choice and, therefore, State has arranged an advocate for him under the legal aid scheme. He filed the appeal from the jail. Here also this Court appointed a State Brief and Adv. Soumya Vathy argued for the appellant.

2. On 30.11.1998 Ext.P1 complaint (F.I.Statement) was received by the Hosdurg Police from the son (PW1) of the deceased Khadeeja.. In the above complaint, it is stated that the deceased was

living with him and his wife and on 15.11.98 she left her house stating that she was going to attend the marriage of a relative at Cherkulam. It is also stated that his father had divorced his mother 15 years ago. It is further stated that he has got hearsay evidence that his mother has told his uncle (PW2) that she wanted to marry one Hamza (accused), but, relatives opposed the same. According to PW1, his mother was aged about 40 years and she was wearing a rose coloured blouse, foreign lunki and green parda at the time when she left for marriage. She was also wearing gold ornaments worth about five sovereigns. On the basis of the above complaint, Ext.P12 F.I.R. was registered in Crime No.609/1998 of Hosdurg police station as a man-missing case and the F.I.R reached the Magistrate's Court on 1.12.1998. Even though such F.I.R was registered, it seems that no serious investigation was conducted by the Hosdurg police immediately. On 30.12.1998 a dead body was found by the forest guard (PW11) in the Kattikulam forest and regarding the finding of the unidentified dead body Ext.P6 F.I. Statement was given and consequently Ext.P10 F.I.R. dated 30.12.1998 was registered at Thirunelli police station in Wayanad District. Ext.P6 F.I. Statement given by the forest guard only states that he found a dead body of a woman in a hanging condition in the forest. The inquest report was taken on the same day. The inquest report shows that on 30.12.1998 when the dead body was found it was in a decayed stage and the body

was found hanged in a lunki on the branch of a teak tree. It is also noticed that only a brassiere, two plastic bangles and a metal bangle are seen on the dead body. It is further stated that even though the place was searched, nothing else was found on the dead body other than the brassiere and bangles which were worn on the body, apart from a lunki on which the body was found hanging. Ext.P15 is the inquest report. The colour of the lunki is stated as a lunki with yellow and red marks. On getting information that an unidentified dead body was found in the jurisdictional area of Thirunelli police station, the son of the deceased (PW1) and brother of the deceased (PW2) went to the police station. According to PW2, they came to know about the unidentified dead body in Thirunelli police station after one and a half months of missing of Khadeeja. According to PW17, Head Constable of Hosdurg police station, on 30.12.1998 he received information regarding the unidentified body and, therefore, he went along with PW1 and his sister to Thirunelli police station. By the time they reached Thirunelli police station, the dead body was already buried and dead body was not seen by PW1 or his sister or PW2. But, according to PW17, the cloth which was tied in the body, bangles, lunki and brassiere were got identified by PW1 and his sister . PW17 never stated that he has taken PW2 along with PW1 to Thirunelli police station.

3. Now, we will come to the evidence of PW1. He was aged 26 at the time of examination, i.e. in January, 2004. He deposed that on 15.11.1998 his mother left the house for attending the marriage of his uncle's daughter at Cherkulam and she never returned. He also deposed that his father had divorced his mother about 15 years back and his mother wanted to marry the accused, but, they objected the same. It is also deposed that his mother used to say that if she is unable to marry the accused she will do whatever she likes and they thought that she must have gone with the accused. He further deposed that his mother was wearing a foreign lunki, yellow blouse and green parda. She had also taken his bag with her. He also stated that when he reached Thirunelli police station on getting information that a dead body was found in the jurisdictional area of Thirunelli police station, the dead body was already buried and in the police station he was shown lunki, blouse, brassiere and parda. Green coloured parda was identified as MO1 and the maroon coloured plastic chappals was identified as MO2. It is interesting to note that as per the inquest report apart from the brassiere, bangles and lunki nothing was seen near the death body at the time of inquest and it was not explained how police was able to show PW1 and get identified MO1 green parda and MO2 plastic chappals through PW1 when he visited the police station. He also identified his bag as MO4 and a green lunki with white marks in the bag as MO5. According to

prosecution, MO4 and MO5 were recovered subsequently on the basis of information given by the accused on 1.3.1999 and there is no chance to identify MO4 at Thirunelli police station on 30.12.1998. He also stated that the parda was given to her by somebody and his mother had no gold ornaments. Bangles were plastic and rold gold metal lolac . He also stated that he did not state to the police that mother has taken his bag and also did not state in Ext.P1 that mother went after borrowing gold ornaments from the relatives. He also stated that he went to parappilly on 15.11.1998 for attending a marriage and he is not aware whether accused participated in that marriage. He did not go to Cherkulam for the marriage of his uncle's daughter. But, on the next day, he enquired whether mother went there, but, mother did not reach there. On 16.11.1998 he enquired in the house of Hamsa, the accused. The accused was there in the house. PW1 also stated that he did not go to the marriage at Cherkulam because a relative died. If that be the reason, why he went to the marriage at Parappally is not explained. If death had occurred in his family, mother also would not have gone at Cherkulam. He also stated that accused has married one Aysha. The suggestion put was that because of the disputes between Aysha and accused, the accused was wrongly implicated in the case by Aysha. It is seen that the lunki, plastic bag, brassiere, metal lolac and bangles were sent from the Thirunelli police station to Hosdurg police station

when PW1 went there on getting information. It is noted that the lunki was mentioned as green lunki with rose coloured flowers. But what is produced as MO7 as found in the dead body as per Ext.P16 photograph is a white cloth with pink stripes and it appears to be a saree rather than a lunki. In any event, what was sent to the court as the one recovered from the dead body and marked as MO7 was not a green coloured lunki with rose flowers. In cross examination PW1 also stated that MO5 was seen by him at Thirunelli police station even though according to prosecution MOs 4 and 5 were recovered subsequently. He has not identified MO7 lunki. It is also pertinent to note that according to the prosecution MO1 parda was recovered after the arrest of the accused, that too on 3.3.1999 on the basis of the information/confession furnished by the accused. If that be so, how the parda was seen by PW1 and PW17 or PW2 at Thirunelli police station on 30.12.1998 when they visited Thirunelli police station. This shows that the alleged recovery of MO1 parda at the instance of confession by the accused is only a creation of imagination of Investigating Officer and a false case is made out as the parda was shown to PW1 and PW2 according to their depositions when they visited the police station much before the arrest of the accused. We have already seen that the only cloth seen on the dead body was the brassiere and lunki was a ligature.

4. Now, we will come to the evidence of PW2. PW2 is the brother of Khadeeja. According to him, on 15.11.1998 Khadeeja went for marriage at Cherkulam and when she went for marriage she also took two gold chains from his brother's wife Haziria and one from daughter-in-law Hajara. He deposed that the marriage at Cherkulam was of his mother's brother's daughter. He has no explanation why he has not gone to Cherkulam for that marriage. He also deposed that he went to Thirunelli police station with PW1 and lunki and bangles were shown to them. He identified the lunki (MO7) shown to him which was green with rose coloured flowers. That is not the one identified by PW1 as MO5. He also identified the brassiere (MO6) as that of his sister's. If deceased was wearing a parda usually, as stated by PW1, how brother identified the brassiere of his sister is also not known. It is also stated that he has no clear knowledge as to who has taken the deceased. He further deposed that he cannot deny if it is asserted that MOs 6 to 9 did not belong to Khadeeja. In cross examination he stated that he cannot say clearly what was the dress worn by Khadeeja at the time she left the house. He further stated that he was questioned by the police before the arrest of the accused. We also note that according to PW17, PW2 had not accompanied PW1 when PW17 visited Thirunelli police station with PW1 and his sister. His identification of material objects cannot be relied on and his evidence cannot connect the accused with the crime. In any

event, PW2 did not go with PW1 to the police station as deposed by him. PW1 and PW2 did not see the dead body and identification of dress of the deceased was not properly proved.

5. PW3 is another witness who has seen the accused and deceased together getting into a bus going to Kannur. He saw them at Kanjangad bus stand. He is not a resident of Kanjangad. He is a resident of Parappilly. According to him, he went via Kanjangad to attend the marriage at Pallikkara. He also identified the parda and bag which was carried by Khadeeja. It was stated that neither Khadeeja nor Hamsa are related to him. It was also not stated that how and why he noticed them in the bus. He has stated that he has no idea whether Hamsa and Khadeeja have any relationship and there is no substantial reason for identifying them. He also stated that within 10 days he told about seeing these two people to others including PW1. PW1 was not questioned regarding this aspect. He further stated in cross examination that police questioned him only after the arrest of the accused. He deposed as follows:

> "Police എന്നെ ചോദ്യം ചെയ്തത് ഹംസയെ arrest ചെയ്ത ശേഷമാണ്"

In re-examination he stated otherwise. He is a chance witness at that

time alleged to have seen Hamsa and the deceased together. There was no reason for identifying them or remembering even the particulars of the bag carried by the deceased and he was not aware of the love affair. They are not closely related and they have no close acquaintance and he is totally a false witness set up by the prosecution. PW4 was examined as a witness to the mahazar of recovery of bag. According to him, he saw the accused taking the bag on 1.3.1999. According to the police, it was recovered only on 3.3.1999. He is an autorickshaw driver. PWs 5 and 6 are the persons who stated that they have given gold chains to the deceased, but, it is pertinent to note that on 15.11.1998 for attending a marriage if the gold chains were borrowed, when she has not returned they must have complained to the police or somebody. They did not complain that Khadeeja went away with their gold chains and PW6 stated that there was no other gold chain for her. Naturally, she would have given a complaint against the deceased, but, their claim arose only after arrest of the accused and the alleged seizure was made. With regard to the alleged seizure, according to the prosecution, the gold ornaments were seized on the basis of the information furnished by the accused from the Jewellery shop owned by PW8. But, PW8 stated that it was not given by the accused and police has taken the above without any reason. It was also averred that Jewellery owners filed a writ petition before the court complaining that police compulsorily

took the gold ornaments from the shop according to their requirement. It is categorically stated that at the time of recovery also accused did not come to the Jewellery. But, some other person accompanied the police in effecting recovery. Same is the evidence of PW9 who was the employee in the shop. PW9 further stated that two or three links were removed for adjusting the weight of the chain as directed by the police. This shows that recovery on the basis of alleged confession by the accused is totally a made up story. We also note the alleged recovery mahazar with regard to the recovery of parda. According to the prosecution, even the place where she was hanged was found out on the basis of confession made by the accused.

> "എന്നെ അവിടെ കൊണ്ടു പോയാൽ ഖദീജയെ കെട്ടിതൂക്കി കൊന്ന സ്ഥലം ഞാൻ കാണിച്ച് തരാം." (Ext.P17)

The dead body was found much earlier to the arrest and on the basis of which Ext.P10 F.I.R. was registered in Thirunelli police station and, therefore, there is no necessity for the accused to show the place after his arrest. In fact, the dead body was found hanging there and, therefore, there is no meaning in Ext.17(a) confession. It is a wholly cooked up story against the accused. Statement which is relied on as Ext.17(a) is an incriminating statement and it cannot be relied on at

all legally under Section 27 of the Evidence Act. He further stated in Ext.17(e) confession statement that he can show the place where the skirt, blouse, chappals, lolac and padaswaram were hidden by him. But, it was deposed by PWs 1 and 2 that MO2 chappals and MO3 lolac were already shown to them at Thirunelli police station much before the arrest of the accused and the skirt, blouse etc. were also not marked in the case. According to PW21, parda was also shown by the accused and recovered on his confession. But, we have already seen that PWs 1 and 2 identified the parda which was shown to them much before the arrest of the accused when they visited Thirunelli police station. The totality of evidence would show that the entire case is falsely foisted and there is no evidence to connect the accused with the crime. Even the dead body was not properly identified. It is true that when the dead body was found, it was in a decayed stage. No steps were taken for superimposition or otherwise to have proper identification of the body and even before the relatives came it was buried and from the brassiere found on the dead body, PW2 cannot identify the dead body. A person can be convicted for offence of homicide only if there is sufficient evidence connecting him with the murder. Here, absolutely no evidence is there to connect the accused with the crime and there is also no proof adduced before the court to show that Khadeeja died. We have also seen that it was not proved that brassiere found was that of Khadeeja and the ligature was also

different. The ligature was stated to have been twisted thrice on the branch of the tree and the photograph would show that there was sufficient length and by the time the body was found out, it was already decayed. In any event, we are of the view that no admissible evidence has been adduced to show that the accused has any connection with the death of the deceased. Since the entire case is concocted, there is no basis for recovery of MOs 4 and 5 also as all recoveries were made falsely. Here, it is not identified that the dead body buried before PW1, PW2 and PW17 went to the Thirunelli police station was that of Khadeeja. We have already seen that identification of MO1 to MO7 by PW1 and PW2 is not correct. Articles recovered on the basis of confession made by the accused were shown to PW1 and PW2 before arrest of the accused and hence recoveries were artificial and was cooked up by the police. PW3 cannot be believed so as to find that deceased and accused were last seen together. After that PW1 saw accused alone in his house when he searched for his mother at the house of the accused. This is a case based on circumstantial evidence. In the absence of direct evidence, for convicting an accused on the basis of circumstantial evidence, it should be proved leaving no doubt that the only conclusion possible from circumstances proved is that accused alone is guilty and nobody else is guilty. Mere suspicious circumstances alone is not enough to convict a person for offence of murder. It is true that commission of offence can be proved by

circumstantial evidence. But as held by the Apex Court in **Balwinder Singh v. State of Punjab** (AIR 1996 SC 607) in a case based on circumstantial evidence the court has to be on its guard to avoid the danger of being swayed by emotional considerations. For convicting the accused generally on the basis of circumstantial evidence, court should be satisfied that all the links in the chain are complete and the only hypothesis possible on the basis of the evidence adduced is that accused and the accused alone is guilty of the offence. (See **C.K.Raveendran v. State of Kerala** (JT 1999 (9) SC 408) and **Jaswant Singh v. State (Delhi Admn.)** (AIR 1979 SC 190). Circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence as held by the Apex Court in **Mangaleshwari v. State of Bihar** (AIR 1954 SC 715). It has been repeatedly held by the Supreme Court that the distinction between 'may be true' and 'must be true' is long and divides vague conjectures from sure consideration and each link must be established by clear and unobjecting circumstances. In **State of Kerala v. Ramachandran** (1999 (3) KLT 512), Chief Justice Arijit Pasayat (as he then was) observed for the Bench as follows:

> "It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances

> should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused."

The Apex Court in **Sharad v. State of Maharashtra** (AIR 1984 SC 1622) prescribed five principles for convicting an accused on the basis of circumstantial evidence which are as follows:

1. the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature.

4. they should exclude every possible hypothesis except the one to be proved; and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is well settled principle that unlike direct evidence, indirect circumstances which throw light, should lead from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction. In this case such consistent conclusive circumstances are absent. Here, none of the circumstances relied on by the prosecution are proved. Dead body was not identified and it was not proved by the prosecution that Khadeeja died. Entire circumstantial evidences are manipulated.

6. In the result, we are of the opinion that prosecution miserably failed to prove the case alleged against the accused and the accused is entitled to get a clean acquittal. His conviction and sentence are set aside. He should be released forthwith from the prison if he is not required in any other case.

The appeal is allowed.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

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